NO. 21469

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ROBERT LEE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in two counts of a four-count indictment, following trial by jury [C.T. 2-5, 28].[1/]

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code,

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1/ "C. T." refers to the Clerk's Transcript of Record.

Sections 2, 498, 2113(a), 2312, 2314 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in each count of a four-count indictment returned by the Federal Grand Jury for the Southern District of California. The first count alleged that appellant, by intimidation, did knowingly and wilfully take, from the person and presence of Esther Fawcett, the sum of approximately $1477, belonging to, and in the care, custody, control, management, and possession of, Bank of America, National City Branch, National City, California, which bank was a bank whose deposits were insured by the Federal Deposit Insurance Corporation. It also alleged that Bernard M. Flynn knowingly aided, abetted, counseled, induced, and procured the commission of that offense.

The second count alleged that appellant, with unlawful and fraudulent intent, caused the transportation of a falsely made and forged security in interstate commerce from San Diego County, California, to Seattle, Washington, knowing said security to have been falsely made and forged.

The third count alleged that appellant knowingly and intentionally transported a stolen 1964 Austin Healey Sprite automobile from San Diego County, California, to Tijuana, Mexico, knowing that the vehicle had been stolen.

The fourth count alleged that appellant possessed a forged and

counterfeited military Certificate of Discharge, knowing the same to be forged and counterfeited, and also possessed a falsely altered military Certificate of Discharge, knowing the same to be falsely altered.

Jury trial of appellant upon Counts One and Three of the indictment commenced on January 12, 1965, before United States District Judge John C. Bowen. The remaining counts were severed [R.T. 14-15] .[2/] Appellant was found guilty as charged in Counts One and Three on January 16, 1965 [R.T. 543] .

Thereafter, on January 28, 1965, appellant was committed to the custody of the Attorney General for 15 years upon Count One. Imposition of sentence as to Count Three was suspended, and appellant was placed upon probation for five years upon that count [C.T. 28] . Appellant thereafter filed a timely notice of appeal [C.T. 31] .

III

ERROR SPECIFIED

Appellant has specified only one point upon appeal:

> "It was a denial of due process for the prosecuting attorney to suppress the existence of an eye-witness to the offense alleged in count one of the indictment until after the close of trial and thereafter refuse to identify said eye-witness." (Appellant's Opening Brief, pp. 4-5).

2/ "R.T." refers to the Reporter's Transcript.

STATEMENT OF THE FACTS

On the night of October 10-11, 1964, Ensign Roy Lyman Sprague left a red 1964 Austin Healey Sprite automobile parked on Eagle Street in San Diego, California. Ensign Sprague returned to the scene during the early morning hours of October 11. The vehicle was missing [R.T.26-27]. He had left no keys in the vehicle [R.T. 26-27, 31].

On October 12, 1967, appellant Lee went to the England Lock and Key Shop in San Diego and asked to have keys made for a red 1964 Austin Healey Sprite automobile. When the vehicle was brought to the shop, it had a Rockford key, which is a type of key not normally used in automobiles [R.T. 66-69].

Appellant obtained two ignition keys and two trunk keys without furnishing a "model" key for either location. The trunk was opened by the locksmith who made the key, and appellant examined a sea bag and other items in the trunk. He said that the vehicle belonged to his nephew [R.T. 69-70].

On the following day, October 13, 1967, appellant drove a red 1964 Austin Healey Sprite automobile into the Like-New Paint Shop in San Diego and asked for a change of color in the paint. The vehicle was then painted a white color [R.T. 52-54].

Miss Joan Tongue went to Mexico with appellant on approximately October 14, 1964. They went to Tijuana, Mexico, and returned to San

Diego in a white 1964 Sprite automobile with appellant driving. About three days earlier, appellant had obtained the vehicle and had told Miss Tongue that he had purchased it from a car dealer [R.T. 111-14].

On November 3, 1964, San Diego Police Officer Robert C. Szymczak observed appellant as the latter operated a white 1964 Sprite automobile in San Diego [R.T. 85-86].[3/]

On the afternoon of October 30, 1964, appellant picked up "his car," a white Austin Healey Sprite automobile, at the Plaza Auto Park in San Diego. He said that he had "a little business" in National City and would return very shortly. He made arrangements with one "Flynn" (whose true name was "Miller") to go with him on the trip [R.T. 235-38].

Appellant Lee entered the Atlas Travel Service Office in National City at a time estimated at 3:30 p.m. on the same date. Using the name of "Willard Rice," he purchased some airline tickets [R.T. 97-98, 104-05]. He then left the office and joined a male individual in a white sports car which was similar in appearance to the 1964 Sprite which appellant was

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3/ There is additional evidence connecting appellant with the theft and foreign transportation of Ensign Sprague's Sprite. This evidence is somewhat clouded by errors in the Reporter's Transcript. Since sufficiency of the evidence is not an issue in this appeal, no attempt will be made in this brief to unravel this involved factual situation.

later driving on November 3 [R.T. 86, 93, 99-100].

At approximately 5 p.m. on the same date (October 30), appellant walked up to a teller's window at the Bank of America, National City Branch, which was located in National City, approximately six blocks from the Atlas Travel Service office. Appellant displayed a note to a teller. The note contained the writing, "This is a hold up, give me all your money. Don't say anything or I will shoot." [R.T. 106, 155, 157]. Appellant placed his right hand inside his coat, and the teller could see the end of a gun. She took the money out of her cash drawer and handed it to him. He said, "Thank you," and walked away. [R.T. 157].

The loss amounted to $1440. The bank deposits were insured by the Federal Deposit Insurance Corporation [R.T. 203, 233-34].

The bank was crowded at the time of the robbery, and approximately 50 to 60 customers and 45 or 50 employees were present. In addition to the teller, Mrs. Fawcett, [4/] another bank employee, Kay Biernacki, observed appellant inside of the bank at approximately 5 p.m. on October 30. Appellant was carrying a white envelope and walking toward the back door [R.T. 207-10, 222-23]. The demand note had been printed on the back of a white envelope. Miss Biernacki smiled at appellant. Employees had been told to smile at the customers [R.T. 157, 223].

4/ Adopting the spelling of her name as it appears in the indictment [C.T. 2] in preference to the spelling in the Reporter's Transcript.

Mr. Philip Stiteler, the operator of the Plaza Auto Park in San Diego, heard a broadcast about the National City bank robbery while appellant and Miller were gone. When appellant and Miller returned to the lot in the car, Stiteler jokingly asked them whether one of them robbed the bank and the other drove the getaway car [R.T. 235, 238].

Miss Tongue saw appellant at midnight on the same day, October 30. Appellant "looked terrible, like he'd been running, like he was frightened from something." [R.T. 116, 133, 143].

Ensign Sprague and a Federal Bureau of Investigation agent looked at Sprague's Sprite at the United Auto Body Shop on January 12, 1965. The Sprite was being repainted red over a white coat which was over an undercoat of red [R.T. 29, 276-77].

Appellant did not testify. Larry Miller testified as a witness for appellant [R.T. 399-426]. Miller had been arrested in connection with the bank robbery in question [R.T. 399-400]. His testimony was impeached upon various points [R.T. 99, 105, 238, 404, 415, 418-19, 422-23, 538].

On January 22, 1965, six days after the verdicts of guilty [C.T. 20; R.T. 543], appellant filed a motion for new trial upon various grounds, including the following:

> "Following submission of the case to the jury, counsel for defendant was advised of the existence of an eye-witness to the offense alleged in Count One of the Indictment, which said witness was neither called as a witness by plaintiff nor disclosed to defendant prior to close of trial." [C.T. 21].

The affidavit in support of the motion stated that one of the attorneys for the defendant was advised by the Assistant United States Attorney who tried the case that "at or about the time of the bank robbery a witness had observed a person vaulting a high fence behind the bank. Said Assistant United States Attorney declined to further identify the witness." [C.T. 22].

Appellee filed an Opposition to the motion. In regard to the alleged witness, the Opposition stated that "the observer was a ten-year old boy (now eleven) who stated that he 'was not positive whether he ran down the alley, up the alley, or jumped over the fence.'" [C.T. 25-26].

V

ARGUMENT

A. NON-DISCLOSURE OF THE EXISTENCE OF A 10-YEAR OLD BOY, WHO MAY HAVE BEEN A WITNESS TO EVENTS OCCURRING NEAR THE TIME OF THE CRIME, DID NOT CONSTITUTE REVERSIBLE ERROR.

Appellant contends that it was a violation of his Constitutional rights for the prosecuting attorney to "suppress" the existence of an "eye-witness" to the bank robbery charge.

The existence of the "witness" was not "suppressed." Appellant's counsel stated that the prosecuting attorney informed him of the existence of the "witness" [C.T. 22]. There is no showing that the boy would have been a helpful witness for the defense. On the contrary, the only reference in the record in regard to this question is an indication that the boy would

individual observed outside of the bank "ran down the alley, up the alley, or jumped over the fence." [C.T. 25-26].

Since the robbery occurred inside of the bank and not in the alley, the boy's opportunity to be a witness to the crime was less than the opportunity of the crowd of approximately 50 to 60 customers and 45 or 50 employees who were inside of the bank at the time of the robbery. [R.T. 222-23].

Even in the unlikely event that the boy could say that the running man was not appellant, the testimony would not have much weight, in view of the fact that two eye-witnesses positively identified appellant as being inside of the bank, the fact that their testimony was uncontradicted (except as to the time of day), and the fact that the running man could easily have been a lookout for appellant during the robbery.

However, disregarding these weaknesses in appellant's position, the basic and fundamental defect in his case is the simple fact that he has made no showing that his defense was prejudiced in any way by the failure to disclose the existence of the "witness."

Rule 52(a) of the Federal Rules of Criminal Procedure provides as

> "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

The United States Supreme Court has stated:

> "Petitioner has been given ample opportunity to prove that he has been denied due process of law. While this Court stands

ready to correct violations of constitutional rights, it also holds that ' it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' "

Darcy v. Handy, 351 U. S. 454, 462 (1956).

In Kyle v. United States, 297 F.2d 507, 513 (2nd Cir. 1961), the Court of Appeals stated:

"A recent note contrasts what is thus believed to be the rule that the knowing use of perjured testimony requires reversal even though prejudice is not affirmatively shown, with 'the area of passive non-disclosure of exculpatory evidence, in which prejudice is the central matter of inquiry and the evidence not disclosed is subjected to a critical examination to determine whether it is reasonably likely that a different result would have been reached had the exculpatory evidence been made available.' The Duty of the Prosecutor to Disclose Exculpatory Evidence, 60 Colum. L. Rev. 858, 863 (1960)." (Emphasis added).

Had appellant been able to show that the alleged evidence would be "exculpatory" (a showing that has not been made and is quite unlikely in view of the record), "prejudice is the central matter of inquiry . . . ."

Appellant notes an indication that the testimony of the witness would not be favorable to his case (Appellant's Opening Brief, p. 8), but he contend that the prosecuting attorney does not have the right to make such a decision

However, the prosecution is not required to disclose the names of all witnesses to the alleged crime.

Curtis v. Rives, 123 F. 2d 936, 940 (C.A. D. C. 1941).

In Woolomes v. Heinze, 198 F. 2d 577 (9th Cir. 1952), appellant contended that the prosecution suppressed the testimony of ten or more witnesses to the crime. This Court rejected the claim and emphasized the fact that the prosecuting attorney was not aware of any evidence favorable to the accused in connection with those witnesses (at p. 579).

In Jordon v. Bondy, 114 F. 2d 599 (C.A. D.C. 1940), the Court of Appeals held that no Constitutional rights were violated where the prosecution allegedly failed to dislose the names of four eye-witnesses whose testimony apparently would not be helpful to the defense (at pp. 603-05). The opinion indicated that the appeal was frivolous (at p. 606).

In Palakiko v. Harper, 209 F. 2d 75 (9th Cir. 1953), this Court referred to the claim of concealment of witnesses to the defendant's statements and listed this argument among items "so insignificant or tenuous that it is difficult to take them seriously." (at p. 95, n.26)

Had appellant attempted to show that his defense was weakened in some way by the mere passive non-disclosure of the existence of the 10-year old boy, he could have asked the Court for an order directing the disclosure of the name and address. If such a request was unsuccessful,

appellant would have something to talk about on appeal.

Appellant emphasizes the fact that the prosecution was directed to reveal all evidence favorable to the defense. However, this fact is immaterial, as there is no showing that the knowledge of the 10-year old would be favorable to the defense.

It should be added that appellant apparently was aware of the existence of the "witness" before the jurors reached their verdicts [C.T. 22] Instead of requesting a continuance, he apparently was satisfied to gamble upon the outcome of the jury deliberations.

Aside from cases stating the minority rule to the effect that the prosecution must call all witnesses to the crime, [5/] the cases cited by appellant are not pertinent to the question whether Constitutional rights are violated by the mere passive non-disclosure of an alleged witness to the crime, where there is no showing that the witness would be helpful to the defense.

5/ The prosecution need not call all witnesses to the crime.

Aycock v. United States, 62 F. 2d 612, 613 (9th Cir.1932), cert. denied, 289 U. S. 734 (1933);

Love v. United States, 74 F.2d 988, 989 (9th Cir. 1935);

Eberhart v. United States, 262 F. 2d 421, 422 (9th Cir. 1958) (appeal dismissed as frivolous);

Cauley v. United States, 294 F. 2d 318, 320 (9th Cir. 1961).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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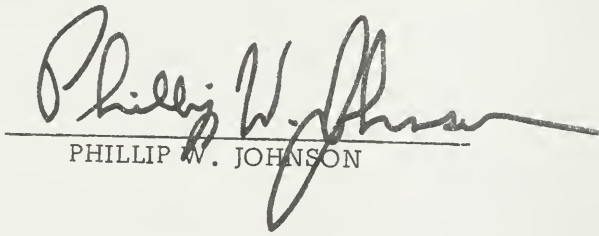
CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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